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In the

Supreme Court of the United States.

October Term, 1919.

ANNIE HARRIS, Formerly ANNIE FRANCIS; AMOS FRANCIS and ELIZABETH FRANCIS, Minors, Appearing by W. C. FRANKLIN, Guardian *Ad Litem*, - - - - - - - - - *Appellants*,

vs.

HARRY H. BELL, J. A. WOOD, H. R. PIERSON, A. C. BRADY, FRANK F. LAMB, A. B. MILLER, MAUDE MITCHELL, W. H. HARRIS, L. A. BELL, H. L. LIGHTSEY, JOHN R. TAYLOR, MACK FRANCIS, J. ORLANDO MITCHELL, HOWELL H. BROWN, THOMAS W. DANIEL, LAURA L. McGINNIS, R. C. MARTIN, H. M. KIRKPATRICK, J. S. KIRKPATRICK, JOHN V. McMAHON, A. W. SHULTHIS, E. J. LAMBERT, W. H. WHITFORD, R. L. EBLING, GERTRUDE WOMACK, HARRY F. EAGAN, EUGENE W. GILL and THE HOPPY-TOAD OIL & GAS COMPANY, a Corporation, - *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Supplemental Brief of Appellants.

JAMES C. DAVIS,
Crook National Attorney.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF OF APPELLANTS.

I.

The District Court for the Eastern District of Oklahoma found that the devolution of the estate of Freeland Francis was governed by the Arkansas law of descent and distribution, and that upon the issuance of a certificate of allotment, the mother, Annie, inherited and became seized in fee simple of an undivided one-half interest in and to the allotment, and that the children, Elizabeth, Amos and Mack, sister and brothers respectively, inherited, and became seized in fee simple of an undivided one-sixth interest, each, therein. The contention was made in the Circuit Court of Appeals that the devolution of the estate was controlled by the law of the State of Oklahoma, by virtue of section 21 of the Enabling Act. The Circuit Court of Appeals, however, dismissed this contention on the ground that the deeds of Annie, and of the guardian of Amos and Elizabeth were valid, and that the question of the devolution of the estate was no longer in the case. It is insisted here that those deeds were invalid and, hence, that that question is in the case, and a proper subject for consideration by this court.

In this view of the matter, the attention of the court is invited to the case of *Jefferson et al.* v. *Fink et al.*, 247 U. S. 288, wherein it was held by this court that, on the admission of the State of Oklahoma to

the Union, the statutes of that state supplanted the Arkansas statutes, and governed the descent and distribution of Creek allotments.

The attention of the court is further invited to the case of *McKee* v. *Henry*, 201 Fed. 74, wherein it is held by the Circuit Court of Appeals for the Eighth Circuit as follows:

> "The enrolling primarily established the right of citizenship, and only incidentally conferred the right to allotment, and until allotment was made no inheritable right vested in an individual Indian,"

and again:

> "When the allotment was made for the first time the rights of any individual vested, and the title became vested in the one at that time fixed by law, it makes no difference what previous laws may have provided.
>
> "In the conclusion we have reached we find that we are in harmony with the Supreme Court of Oklahoma. *Brady* v. *Sizemore*, 124 Pac. 615; *Shellenbarger* v. *Fewel*, 124 Pac. 617.
>
> "While our conclusion has been reached under the authority of the Supreme Court of the United States, of this court, and what seems to us sound reason, it is gratifying to find that there is a uniformity in the decisions of the state courts and this court."

It would seem to follow, from these decisions, and others that might be quoted, that the devolution of the allotment of a Creek Indian is governed by the law in force at the date of selection. In the instant case, Freeland Francis was born on the 30th day of April, 1903, and died on the 22nd day of June, 1905, without issue and unmarried. His father, William Francis, had previously died on the 6th day of April, 1905. Freeland Francis, therefore, left surviving him, as his sole heirs at law, his mother, Annie, his sister, Elizabeth, and his brothers, Amos and Mack. If the Arkansas law governed the devolution of the estate, then the mother became entitled to an undivided one-half, and the sister and brothers each to an undivided one-sixth, as found by the trial court, but the selection of the allotment in behalf of the deceased allottee was made on December 4, 1907, by the Commission to the Five Civilized Tribes, and on that date Oklahoma had been admitted to the Union as a state, and the Statutes of Oklahoma Territory, by virtue of section 21 of the Enabling Act, had been extended and put in force over the entire state, including that part of it comprising the Creek Nation. If, therefore, the law of Oklahoma governs the devolution of the estate, as of December 4, 1907, the date of selection, that law is to be found in the third paragraph of section 97, article 4, chapter 86, entitled "Wills and Succession," of Wilson's Revised and

Annotated Statutes of Oklahoma, 1903, which reads as follows:

> "If there be no issue, nor husband, nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if a mother survive, she takes an equal share with the brothers and sisters."

Under this statute the mother, Annie, and each of the three children, Mack, Amos and Elizabeth, would inherit an undivided one-fourth interest in the allotment of Freeland Francis.

II.

We desire to revert briefly to our first proposition, that appellants took as allottees, for the purpose of inviting the attention of the court to the case of *Hall et al.* v. *Russell et al.*, 101 U. S. 503. This case is much in point upon that proposition. Freeland Francis was enrolled under the Act of March 3, 1905, but, as we have heretofore seen, that act, to be effective, must relate back to section 28 of the Original Creek Agreement and section 7 of the Supplemental Creek Agreement, providing for allotments to new born children. It will be noted, as we have heretofore had occasion to state, that, in the various Acts of Congress providing for the distri-

bution of lands allotted after death, there occurs invariably the words "The lands and moneys to which he would have been entitled if living shall *descend* to his heirs * * * and be *allotted* and *distributed* to them accordingly."

The case of *Hall* v. *Russell, supra,* involved the construction of the Oregon Donation Act, and the language of that act is, in many respects, extremely similar to the language employed in section 28 of the Original Creek Agreement and section 7 of the Supplemental Creek Agreement. That act provided for the acquirement of title to lands in Oregon by settlers on the terms and conditions therein named. Upon the fulfillment of those terms and conditions the settler became entitled to a patent, but, if he died before their fulfillment and the issuance of patent, then provision was made by section 4 for the disposition of his rights in the land, acquired up to the date of his death, by the language following:

> "Children or *heirs of the deceased shall be entitled to the share or interest of the deceased* in equal proportions, except where the deceased shall otherwise dispose of it by testament, duly and properly executed according to the laws of Oregon,"

and, in the instance of alien settlers, similar provision was made in the event of death before naturalization, in the language following:

> "But if any alien, having made his declaration of an intention to become a citizen of the United States, after the passage of this act, shall die before his naturalization shall be complete, the possessory right acquired by him under the provisions of this act shall *descend to his heirs at law, or pass to his devisees*, to whom, as the case may be, the patent shall issue,"

and by section 8 of the act, it was provided as follows:

> "*Section 8.* That, upon the death of any settler before the expiration of four years' continued possession required by this act, all the rights of the decedent, under this act, shall *descend to the heirs at law of such settler*, including a widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler, shall be sufficient to entitle them to the patent."

In that case one John Loring was the settler on the land in controversy. Having lived on it less than a year, however, he died, and left a will devising his interest in it to one Samuel Parker Hall. On the death of Loring, another party claimed title to the land as a settler in behalf of himself and wife, and the question was as to whether these latter parties were entitled to the land, or whether the devisee of Loring was entitled to it. This court stated the question to be as whether the heirs of a settler under

the act, who died before the expiration of the four years' residence and cultivation required, took by descent from the settler, or as donees of the United States; that, if they took by descent, it was concluded that the settler had a devisable estate, but, if they took as donees of the United States, the settler had no such estate as was devisable. It was concluded by the court that, "Under section 4 of the act that there was no grant of the land to the settler until he had qualified himself to take as grantee by completing his four years' residence and cultivation, and performing such other acts in the meantime as the statute required, in order to protect his claim and keep it alive. Down to that time he was an authorized settler on public lands, but was not a grantee."

Commenting on section 8, above quoted, this court said:

> "Here is a plain indication that the right of the settler before the expiration of his four years' continued possession was something less than a title in fee to the land, for the provision is not that the *land* shall descend, but the settler's *rights* only. Had it been supposed that the title was already in the settler, subject only to defeasance, if the conditions subsequent to the grant should not be performed, we cannot but think that provision would have been made for a transfer of the land free of the conditions, instead of only the settler's rights. The object of Congress, undoubtedly, was to allow a set-

tler's heirs to succeed to his possession and thus keep his rights alive. But for some such provision all rights of the settler would have been lost by his death. As the law required full four years' residence by the person who claimed the grant, if no provision had been made for a continuance of his possession the land would have become vacant on his death and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force. Hence, it was provided that the possessory rights of a deceased settler should go to his heirs, and that they might get the land on making the requisite proof, without further residence and cultivation of their own. *Their title to the land was to come not from their deceased ancestors, but from the United States.* The title, it is true, was granted to them by reason of the possessory rights of their ancestor, but these were rights which he could not transfer and which passed to them under the statute without any act of his. *On his death his heirs became qualified grantees.* Whether they took immediately on his death or after proof of his compliance with the provisions of the act while in life, need not be decided. It is enough for this case that when their ancestor died he had nothing in the land which he could transmit to them, and that what they afterwards got *came from the United States and not from him.* All his rights in the land were dependent on his completion of the four years' possession; but in consideration of what he had done Congress made his heirs the special objects of its bounty if he died before his

> own grant had been secured. *We attach no importance to the word 'descend,'* as used in this section. In section 4 the word selected to convey substantially the same idea was 'entitled.' The thing done was to give the heirs of a settler the benefit of his rights and to designate them as the recipients of the bounty of the government, instead of him."

The italics in the above and foregoing excerpt are ours. We regard the facts in the case, and the decision by the court, not only as persuasive and analogous to the case now under consideration, but as direct authority for our position that appellants took as original allottees.

In the Original and Supplemental Creek Agreements it was provided that if the citizen enrolled should die before receiving his allotment, then the allotment to which he would have been *entitled,* if living, should *descend* to his heirs, and be allotted and distributed to them accordingly. We can perceive no appreciable difference between these provisions and the provisions of the Oregon Donation Act in respect to the disposition to be made of the lands following the death of the settler. In *Russell* v. *Hall, supra,* it is held that, upon the death of the settler, his heirs became qualified grantees, and that the title acquired by them came from the United States, and not the deceased settler. The words *entitled* and *de-*

scend occur both in the Donation Act and the Creek Agreements, and this court said, in the *Russell-Hall* case, that no importance was to be attached to the word "descend," and that in section 4 the word selected to convey substantially the same idea was "entitled," and that the purpose of the entire act was to give to the heirs of the settler the benefit of his rights, but that the heirs took as grantees of the United States, as the designated recipients of the bounty of the Government, and not of the settler. So, in the present case, it would seem to follow that the heirs of an enrolled citizen took as grantees of the Creek Nation and the United States, as the designated recipients of their bounty, in right of the deceased enrollee, but not of and from him. If no importance was to be attached to the word "descend" in the connection in which it is used in the Oregon Donation Act, then it is difficult to understand how any importance should be attached to it in the Original and Supplemental Creek Agreements.

Respectfully submitted,

JAMES C. DAVIS,
Creek National Attorney.